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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

To: The Commission

COMMENTS OF COX COMMUNICATIONS, INC.

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SUMMARY

The Commission should focus its efforts in this proceeding on two goals: implementing the Congressional intent to promote facilities-based competition in the local exchange market and adopting limits on the unbundling of ILEC network elements that are consistent with the requirements of section 251(d). These goals reinforce each other, and support the unbundling of at least four network elements — operational support systems ("OSS"), operator services, directory assistance and access to signaling functionalities — that are critical to the operations of even facilities-based carriers in today's environment.

The first factor in the Commission's evaluation of the unbundling requirement must be the Congressional intent in adopting the 1996 Act. The purpose of the Act is to break incumbent LECs' 100-year-old stranglehold on the local exchange market by removing a variety of barriers to entry. While Congress authorized three different market entry strategies for new competitors, it also established a preference for facilities-based competition in the specific language of sections 251 and 271, in the structure of the statute and in the legislative history explaining the 1996 Act. The Commission should heed this preference in adopting revised rules governing which elements will be made available.

The Commission also should consider how its own policy goals will be advanced by rules that encourage facilities-based competition. The Commission's current unbundling rules, coupled with its TELRIC pricing methodology, provide reduced incentives for CLECs to deploy their own facilities. Yet facilities-based competition will increase incentives to innovate and eliminate current outmoded cost structures, while increasing the reliability of networks in emergencies. The development of facilities-based competition also will hasten the day when

active price regulation of incumbents will become unnecessary. For similar reasons, the Commission should be careful to avoid policies that unintentionally encourage the use of UNEs, which could distort economic incentives and discourage beneficial facilities-based competition.

At the same time, the Commission's rules must comply with the requirements of section 251(d), as explicated by the Supreme Court. That means that the Commission must set real limits on the availability of UNEs from ILECs. It also must differentiate between when a proprietary element is "necessary" and when the unavailability of other, non-proprietary elements would "impair" a CLEC's ability to provide service. These requirements are entirely consistent with, and in fact reinforce, the Congressional preference for facilities-based competition.

In considering the meaning of "necessary," the Commission should be guided by antitrust law principles, and particularly by the "essential facilities" doctrine, as suggested by Justice Breyer. Certain cases invoking that doctrine, notably those involving denial of access to a monopolist's facilities that eliminated the possibility of competition, provide a useful analogy to the "necessary" standard. This is particularly the case because the structure of section 251(d) and common sense demonstrate that the "necessary" standard must be more difficult to meet than the "impair" standard.

The Commission also can look to antitrust law, as well as Constitutional standards governing impairment of contracts, to define the meaning of "impair." Impairment should be limited to effects that create a material detriment or that severely handicap the CLEC, including significant differences in quality and availability. One touchstone the Commission can use in determining if the "impair" standard is met is whether unavailability of an unbundled element

from the ILEC will cause a CLEC to lose customers or be unable to gain customers in the marketplace.

Under these standards, Cox has identified four network elements that should be unbundled. First, the Commission should require ILECs to provide unbundled electronic access to OSS. This access is essential to any CLEC using any unbundled element, and the inability to obtain information on such matters as installation times or repair intervals will result in serious customer service concerns that plainly will affect the ability of the CLEC to obtain and retain customers.

CLECs also require access to both operator services and directory assistance. While versions of these services may be available from third party vendors, they are for a number of reasons of much lesser quality than ILEC services and use much less current information. The ILEC advantage in providing these services is not the result of their business skills; rather it is a legacy of their century-old mandated monopolies over local exchange service. Moreover, failure to have access to ILEC operator services could raise significant public safety concerns.

The fourth element that should be subject to the unbundling requirement is signaling, along with signaling databases. Again, while there are vendors of signaling, their services are not of the same quality as ILEC signaling, so that there can be significant and harmful delays and errors in call routing and other functionalities. In addition, ILECs are the only reliable providers of some signaling-related information, such as Calling Name, which are necessary to provide services, such as Caller ID, that customers expect their local exchange carrier to be able to provide.

Finally, the Commission should review the list of elements to be unbundled on a periodic basis. Periodic re-evaluation of the unbundling rules is appropriate in light of the Congressional intent to limit regulation whenever possible and to promote facilities-based competition. There is no bar on such a review, which in fact is consistent with the Commission's regulatory reviews under section 11 of the Communications Act and with the Commission's basic power to review and revise its own regulations.

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Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its comments in response to the *Second Further Notice of Proposed Rulemaking* in the above-referenced proceeding.[1/] Cox has a longstanding interest in the establishment of sustainable local telecommunications competition. As shown in its comments in the original local competition proceeding, Cox strongly supports the adoption of predictable, uniform federal rules for interconnection pursuant to sections 251 and 252 of the Telecommunications Act of 1996 (the "1996 Act").[2/] Cox also believes that the Commission has properly resolved most of the issues

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *Second Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-98 and 95-185, FCC 99-70 (released April 16, 1999) (hereafter the *"Notice"*).

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) *codified at* 47 U.S.C. §§ 151 *et seq.* *See also* Cox's Comments, CC Docket No. 96-98, filed May 16, 1996 (hereafter "Cox 1996 Comments").

surrounding the implementation of those statutory provisions. In this proceeding, however, the Commission has been charged by the U.S. Supreme Court to re-evaluate the rules governing the unbundling of incumbent LEC network elements. Cox urges the Commission to take this opportunity to revise its rules to better reflect Congress' policy preference for the deployment of long term, sustainable facilities-based competition.

I. INTRODUCTION

Cox's interest in this proceeding stems from its longstanding commitment to provide facilities-based, competitive, circuit switched local telecommunications services to both residential and business customers over its advanced cable infrastructure. Cox subsidiaries have been authorized to operate as competitive local exchange carriers ("CLECs") in thirteen states.[3/] Cox plans to deploy circuit switched digital local telephone services throughout its clustered cable systems, which now serve roughly four million cable customers.[4/] In fact, Cox has invested over $4 billion of venture capital over the past six years to transform its vision of facilities-based competition with the ILECs into a reality.

As a facilities-based CLEC that has invested heavily in telecommunications switching and other local facilities and network support, Cox does not need or seek the full range of ILEC unbundled network elements ("UNEs") that the Commission previously determined must be

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3/ These states include California, Arizona, Nevada, Nebraska, Oklahoma, Louisiana, Rhode Island, Florida, Virginia and Connecticut.

4/ Following consummation of two recently-announced transactions, Cox will serve approximately five million cable customers.

made available. Nevertheless, even fully facilities-based CLECs like Cox must rely upon ILECs to ensure the mutual exchange of traffic and the smooth transition of customers from one carrier to another by means of efficient and dependable electronic interfaces. If, for example, an ILEC fails to properly port the telephone number of a new Cox customer, that customer will be unable to receive incoming calls. When this problem occurs, however, it is commonly viewed by the customer as a Cox "quality of service" problem. The ILEC's failure to provide adequate interconnection and electronic provisioning, in short, can quickly lead to a loss of Cox customers.

The unavoidable dependence of facilities-based CLECs on the ILECs for certain unbundled network elements should not be overlooked in this proceeding. The Commission should factor this unavoidable dependence into its analysis of what ILEC elements should be provided to competitors. At the same time, the Commission must be careful not to overreach. The basic goals of the 1996 Act are best met by FCC rules that require access only to those ILEC network elements that are truly competitively significant. A decision to designate a particular ILEC network component or function as a UNE that must be made available will have an impact on the development of facilities-based competition. Under the Commission's rules, UNEs are priced on a forward-looking, incremental cost basis. A regulatory regime that fosters the broad availability of incrementally priced UNEs discourages competing carriers from building their own networks and leaves them dependent over the long term on the ILECs, to the detriment of the public interest.

When developing new standards for assessing which ILEC UNEs should be made available to competitors, Cox urges the Commission to adopt different standards for proprietary versus non-proprietary UNEs. Contrary to the Commission's earlier action treating "necessary" and "impair" as a single standard, as set forth in section 251(d)(2) of the 1996 Act, "necessary" and "impair" are not the same. As the Supreme Court has suggested, and as a review of the statutory language reveals, the former is more stringent than the latter.

Moreover, when articulating the differences between the two standards, Cox recommends that the Commission be guided by the various iterations of the "essential facilities" doctrine found in antitrust case law. This doctrine, discussed at length in Justice Breyer's Supreme Court opinion, generally states that monopolists should not be required to permit nondiscriminatory access to their facilities except where the failure to do so would severely impede or altogether preclude competition. As discussed in more detail below, Cox believes that a proprietary UNE should be deemed "necessary" only when it is demonstrably *indispensable* to competition in the local exchange. By contrast, lack of access to a non-proprietary UNE should be deemed to "impair" the provision of a telecommunications service when it *severely handicaps* the competing carrier.

Applying these standards, Cox has identified four ILEC network elements that should be made available: Operational Services Support, Operator Services, Directory Assistance and Signaling and related databases. Unbundled access to these network elements is essential if competing telecommunications carriers are to have any success in the local telecommunications marketplace. The Commission should not presume, however, that adequate marketplace

substitutes will not develop for these elements and, in the future, give competing carriers readily available alternatives. Cox thus recommends that the Commission periodically review the unbundled network elements it directs ILECs to make available to ensure they are still critical to local exchange competition.

II. REVISED UNE RULES SHOULD NOT DISCOURAGE THE DEVELOPMENT OF FACILITIES-BASED COMPETITION

A. The Commission Should Support the Development of Facilities-Based Competition When Setting Parameters for the Unbundling Requirement.

The Supreme Court's review of the *Local Competition Order* largely supported the Commission's expansive interpretation of its role in helping to facilitate the introduction of competition into the local exchange market. Cox has similarly supported the Commission's view that the 1996 Act permitted and, in fact, required the adoption of a uniform set of predictable national rules or guidelines for competitive entry and interconnection.[5/]

The single area where the Supreme Court disagreed with the Commission's actions was the Commission's interpretation of the ILEC unbundling obligations under section 251(d)(2) of the Act.[6/] The Commission's UNE rule, section 51.319, specifies seven ILEC network elements that must be made available at the request of a telecommunications carrier. The Supreme Court

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5/ Cox 1996 Comments at 5-6, 23.

6/ Section 251(d)(2) addresses the criteria the Commission must apply, at a minimum, prior to ordering an ILEC to unbundle a network element and make it available to a competitor. Specifically, the Commission must determine: (1) whether access to ILEC proprietary network elements is "necessary" and (2) whether the failure of an ILEC to provide a network element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

vacated this rule and directed the Commission to re-examine the statutory scope of the ILEC unbundling obligation.[7/] Specifically, the Court concluded that section 251(d)(2) requires the Commission to apply *some* limits to the unbundling obligation that are rationally related to the goals of the Act. The Court was concerned that the Commission may have erroneously concluded that the ILECs have a more generalized legal requirement to make *all* their network elements available.[8/] The Court stressed, however, that section 251(d)(2) does *not* authorize the Commission to require the unbundling, upon request, of virtually anything that can be identified as an ILEC network element.

The Supreme Court's view that parameters must be placed on the ILEC's legal obligations to unbundle and to make available portions of their networks is consistent with the strong preference in the 1996 Act for the establishment of sustainable facilities-based competition for telecommunications services. This Congressional preference is reflected in both the structure of the legislation and related legislative history.

One example of this preference for facilities-based competition in the local exchange market is set forth in section 271 of the 1996 Act, which prohibits Bell Operating Companies ("BOCs") from providing in-region interLATA services until they have opened their local exchanges to competition. A BOC cannot satisfy the "in-region" test unless it faces competition from a facilities-based competitor or competitors (section 271(c)(1)(A) ("Track A")) or,

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7/ *AT&T v. Iowa Util. Bd.*, 119 S. Ct. 721, 736 (1999).

8/ *Id.*

alternatively, unless any facilities-based competitor fails to request access or interconnection (section 271(c)(1)(B) ("Track B")).[9/]

Section 271 stands as powerful testament to Congress' view that the presence of one or more facilities-based local competitors in a BOC's service area is the most reliable evidence that the BOC's local markets are, in fact, open to competitive entry. By precluding BOCs from applying for in-region interLATA authority under Track B while carriers that have requested interconnection are in the process of becoming operational, Congress demonstrated its intent that the construction of new facilities by new entrants remain the primary indicator that BOC entry into the interLATA service market under section 271 is appropriate.[10/]

Another indication of the significance of facilities-based competition is found in section 10 of the 1996 Act. While Congress provided the Commission with substantial authority to forbear from regulating under section 10, this authority does not permit the Commission to forbear from fully implementing either the 1996 Act's interconnection provisions or the "competitive checklist" provisions of section 271. This express exclusion reflects Congress'

9/ House Conference Report No. 104-458 and Senate Conference Report No. 104-230 at 147-149 (the "Joint Explanatory Statement"). With respect to the facilities-based competitor requirement, the Statement notes that the competitor must offer telephone exchange service either exclusively over its own facilities or predominantly over its own facilities in combination with the resale of another carrier's service. *Id.*

10/ Application by SBC Communications Inc. to Provide In-Region, InterLATA Services in Oklahoma, *Memorandum Opinion and Order*, 12 FCC Rcd 8685 (1997) ("*Oklahoma Order*"). There, the Commission cited the House Committee Report which stated that the existence of a facilities-based competitor that is providing service to residential and business subscribers "is the tangible affirmation that the local exchange is indeed open to competition." House Report No. 104-204 at 76-77.

determination that there be a full and fair opportunity for facilities-based carriers to become established before the Commission decides to relax its uniform, national regulations that govern the development of local exchange competition.

Yet a third aspect of the 1996 Act that reflects a preference for the development of facilities-based competition concerns the statute's cost standards for various forms of market entry. The 1996 Act does not dictate a single means for a new entrant to choose to enter the local telecommunications market. Instead, it sets forth at least three different entry strategies: (1) via resale; (2) through the purchase of ILEC network functions; or (3) by the provision of facilities-based services. The non-facilities-based entry avenues were adopted because Congress recognized that many competitors would not have fully redundant networks in place when they initially offer service.[11/] It was Congress' expectation, however, that competitors would, over time, make the network investments necessary to go toe-to-toe with the incumbent and would, by competing on a facilities basis, spur the incumbent to continue to upgrade its network and services.

11/ Joint Explanatory Statement at 148. Although the Commission has not always accepted Congress' lead on this issue, it recognized in the *Notice* that the option of purchasing network elements from the incumbent ILEC was secondary to the construction of new facilities. *See also* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Report*, CC Docket No. 98-146, FCC 99-5 (rel. February 2, 1999), at ¶¶ 1 and 98 (the *"Advanced Services Report"*). In the *Advanced Services Report*, the Commission cautioned that it "will not hesitate to promote competition and reduce barriers to infrastructure investment so that all companies have market-based incentives to invest, innovate and meet the needs of all consumers." *Id.* at ¶ 98.

Congress also set forth the specific price and cost consequences that would follow from the selection of a particular market entry strategy. Section 252(d) contains costing standards for each of the three distinct modes of market entry. The most favorable of these to competing carriers is set forth in section 252(d)(2), which states that the compensation for transport and termination of traffic is governed by a pure incremental cost standard.[12/] This cost standard plainly benefits facilities-based competitors whose principal requirement is to interconnect with ILECs for the purpose of mutually exchanging traffic. By contrast, the cost standard set forth in section 252(d)(1), which governs interconnection and the lease of unbundled network elements, is potentially less accommodating to competitors: prices for UNEs must be cost-based, and may include a reasonable profit.[13/] Similarly, the resale pricing standard set forth in section 252(d)(3) entitles telecommunications resellers only to a discount from the retail rates for service charged by the ILECs. This statutory framework strongly suggests that Congress intended to incent competing telecommunications carriers, through the different cost standards, to build their own facilities and to rely as little as possible on the incumbent's infrastructure.

The construction of network facilities by new entrants is a critical goal of the 1996 Act. The Commission's reexamination of the ILECs' unbundling requirement should therefore

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12/ 47 U.S.C. § 252(d)(2)(B) (compensation for terminating calls limited to "a reasonable approximation of the *additional costs* of terminating such calls") (emphasis added).

13/ 47 U.S.C. § 252(d)(1) (charges for network elements "(A) shall be (i) based on the *cost* of providing the . . . network element . . . and (ii) nondiscriminatory, and (B) *may include a reasonable profit*") (emphasis added). Although the Commission decided to use the same pricing methodology for the transport and termination needed to exchange traffic and the lease of UNEs, that determination was not required by the statute, and, in fact, undermines the Congressional preference for facilities-based competition.

proceed with a commitment to adopt policies that will encourage competitors to wean themselves from reliance on ILEC UNEs and that promote Congress' vision of facilities-based competition.

B. Facilities-Based Competition Serves the Commission's Other Critical Long-Term Goals.

For several reasons, facilities-based competition is the most direct way to break the ILEC's stranglehold over the local exchange market and to create real consumer choice. First, a facilities-based carrier, unlike a carrier that uses a collection of ILEC UNEs, does not depend on obtaining most of its network facilities and functions from the ILEC. The facilities-based carrier will have its own cost structure and efficiencies, and will have the ability to target markets and promote the services it can best provide. This flexibility allows the facilities-based competitor to create new and potentially better, lower cost services. In addition, the resulting network diversity creates important failsafe routing for communications in the event of emergencies. The presence of facilities-based carriers also increases the likelihood that both business and residential customers have competitive choices of service providers. Indeed, Cox has made such facilities-based telecommunications competition a growing reality.

Second, promoting facilities deployment as a national goal also advances the moment when active price regulation of the incumbent becomes unnecessary. Head-to-head competition ensures that consumers are charged reasonable rates not because of regulation, but because unaffiliated carriers typically provide a range of services while competing over prices. Sustainable facilities-based competition also allows regulators to suspend review of ILEC cost allocations and it alleviates concerns about anticompetitive cross-subsidization. Thus, the

beneficial results of vigorous facilities-based competition go hand-in-glove with another purpose of the 1996 Act, to reduce regulation.[14/]

C. *Rules That Inappropriately Encourage the Use of UNEs Could Distort CLEC Market Entry Choices and Harm the Development of Facilities-Based Competition.*

Because new entrants may lack critical network components and functions, section 251(d)(2) of the Act allows requesting carriers to gain non-discriminatory access to the ILEC unbundled network elements that the Commission specifies. In the *Local Competition* proceeding, however, the Commission adopted policies that encourage CLECs to remain overly dependent on ILEC UNEs and that discourage the deployment of new facilities. The Commission first made ILEC network elements broadly available. It then adopted a UNE cost standard — TELRIC — that results in the ILEC platform being made available at deeply discounted rates. Indeed, CLECs may purchase UNEs at a substantial discount over the resale discounts also provided for under section 252(d).[15/] These discounts — estimated by economists to vary from 40 to 60 percent from tariffed rates for service — provide significant incentives for new entrants to obtain UNEs from the ILECs rather than considering deployment of competitive

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14/ *See* Joint Explanatory Statement at 1.

15/ The Supreme Court acknowledged that the Commission's rules effectively require ILECs to make every component of their networks available to competitors at a TELRIC rate, thereby discouraging ILECs from investing in their networks. The Supreme Court determined, however, not to reach this issue, noting that the Commission on remand could remove some pieces of the ILEC networks from the UNE list, thereby eliminating the possibility that a CLEC might seek to purchase a "UNE platform" from an ILEC at rates substantially lower than the retail service resale discounts. *AT&T v. Iowa Util. Bd.*, 119 S. Ct. at 736.

facilities. Accordingly, instead of promoting local competition, the current broad availability of UNEs and the Commission's pricing methodology actually jeopardize the development of facilities-based competition.

The Supreme Court has properly directed the Commission to re-evaluate its UNE unbundling rules. As discussed below, the most reasonable interpretation of the underlying statutory directives will lead to rules which better promote facilities-based competition. By carefully following Congress' intent and becoming more judicious in its choice of ILEC network elements to be unbundled and made available, the Commission can help inject more rational economic incentives into the local exchange market.

III. THE COMMISSION MUST DEVELOP A COHERENT LEGAL STANDARD, CONSISTENT WITH THE OVERRIDING GOALS OF THE 1996 ACT, FOR IDENTIFICATION OF THE PROPRIETARY AND NONPROPRIETARY NETWORK ELEMENTS THAT MUST BE PROVIDED ON AN UNBUNDLED BASIS.

In *Reno v. ACLU*, the Supreme Court expressly recognized that the 1996 Act "was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies'. The major components of the statute . . . were designed to promote competition in the local telephone service market . . . ."[16/]

16/ *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2337-38 (1997) (holding that provisions of the Communications Decency Act restricting transmission of obscene or indecent communications by means of telecommunications devices or through use of interactive computer services were, *inter alia*, facially overbroad in violation of the First Amendment).

The Commission also has recognized that the Act "changed the landscape of telecommunications regulation" by "arm[ing] new entrants into previously closed telecommunications markets as well as this Commission and state regulators with powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past."[17/] As the Commission has observed, Congress has "rejected the historic paradigm of telecommunications services provided by government-sanctioned monopolies in favor of a new paradigm that encourages the entry of efficient competing service providers into all telecommunications markets." "The ultimate goal of the 1996 Act," according to the Commission, "is the deregulation of these markets that historically have been regulated, in large part by state commissions, when justified by the presence of competition."[18/]

Among the new and powerful tools given the Commission under the 1996 Act is the authority to mandate the sharing of the incumbent monopolist's network elements with competitors on an unbundled basis. This sharing of one competitor's property with others is a fairly extraordinary regulatory remedy. It must therefore be exercised with caution. Indeed, the Commission itself has recognized that the local competition provisions of the Act are to be interpreted in a manner "that encourages the *entry of efficient competing service providers*" into

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17/ The Public Utility Commission of Texas; The Competition Policy Institute; IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc.; City of Abilene, Texas; Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order*, 13 FCC Rcd 3460, 3461-2 (1997).

18/ *Id.* at 3461.

all telecommunications markets. To develop rules that achieve this end, the Commission must take into account the relative benefits and costs attendant upon making a UNE available. It also must acknowledge that the "necessary" and "impair" standards function as tempering factors to the unusually broad grant of authority to determine which network elements an ILEC must share with its competitors on an unbundled basis.

A. The Commission Must Embrace the Congressional Preference for Facilities-Based Competition.

In establishing access standards for unbundled network elements, section 251(d)(2) directs the Commission to consider whether:

> (A) access to such network elements as are proprietary in nature is necessary; and
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

In the *Local Competition Order*, the Commission defined a "necessary" network element as one that is a "prerequisite" to competition. "[I]n some instances, it will be 'necessary' for requesting carriers to obtain access to proprietary elements (*e.g.*, elements with proprietary protocols or elements containing proprietary information), because without such elements the ability of requesting carriers to compete would be significantly impaired or thwarted."[19/] The Commission adopted a dictionary definition of the term "impair" that means "to make worse or

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19/ *Notice* at ¶ 16, *citing* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 15641 (1996) (the "*Local Competition Order*").

cause to become worse; diminish in value."[20/] The Commission also determined that a requesting carrier's ability to offer service is "impaired" (diminished in value) if the "quality of the service the entrant can offer, absent access to the requested element, declines" or if "the cost of providing the service rises."[21/]

The Supreme Court, however, criticized the Commission's analysis. Since the Court agreed with the ILECs that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it has simply failed to do,"[22/] it held that it did not need to reach the question of whether, as a matter of law, the 1996 Act requires the FCC to apply the "essential facilities" doctrine of antitrust theory in determining which network elements to unbundle. The Court then faulted the Commission for several deficiencies in its application of the necessary and impair standards of section 251(d)(2).

First, the Supreme Court faulted the FCC's failure to adequately take into consideration, in deciding which elements must be unbundled, the "availability of elements outside the incumbent's network."[23/] Second, the Court found that the Commission erroneously assumed that *any* increase in cost (or decrease in quality) imposed by a denial of a network element renders access to that element "necessary" and "impairs" the entrant's ability to furnish its

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20/ *Notice* at ¶ 17, *citing Local Competition Order*, 11 FCC Rcd at 15643 (citing *Random House College Dictionary* 665 rev. ed. 1984).

21/ *Notice* at ¶ 6, *citing Local Competition Order*, 11 FCC Rcd at 15643.

22/ *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. at 734-5.

23/ *Id.* at 735.

desired services.[24/] Third, the Commission's interpretation was found lacking in that it effectively permitted the entrants, rather than the Commission, to determine whether the requirements of section 251(d)(2) are satisfied.[25/] And, fourth, the Court held that the Commission failed to consistently apply its methodology to each of the network elements it identified as subject to unbundled access.

Justice Breyer, concurring separately, provided additional guidance on the basic congressional objective behind the network element unbundling requirement:

> The unbundling requirement seeks to facilitate the introduction of competition where practical, *i.e.*, without inordinate waste . . . And although the provision describing which elements must be unbundled does not explicitly refer to the analogous "essential facilities" doctrine (an antitrust doctrine that this Court has never adopted), the Act, in my view, does impose related limits upon the FCC's power to compel unbundling. In particular, I believe that, given the Act's basic purpose, it requires a convincing explanation of why facilities should be shared (or "unbundled") where a new entrant could compete effectively without that facility, or where practical alternatives to the facility are available.[26/]

Continuing, Justice Breyer noted that in addition to the limitations suggested by the statutory terms themselves, the "fact that compulsory sharing can have significant administrative and social costs inconsistent with the Act's purposes suggests the same." Justice Breyer described how even the simplest kind of compelled sharing, that of a physical facility, means that someone must oversee the terms and conditions of the sharing, and that such sharing "may diminish the original owner's incentive to keep up or improve the property by depriving the

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24/ *Id.* at 733-36.

25/ *Id.* at 735.

26/ *Id.* at 753 (citations omitted).

owner of the fruits of value-creating investment, research, or labor."[27/] The more complex the facilities subject to sharing, "the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious . . . And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide."[28/]

Justice Breyer further observed that, in the face of an aggressive sharing requirement, meaningful competition would likely emerge only in the unshared portions of the enterprise.[29/] A policy that merely encourages substitution of one competitor for another does little to advance competition as a whole. As Justice Breyer noted:

> A totally unbundled world — a world in which competitors share every part of an incumbent's existing system, including, say, billing, advertising, sales staff, and work force (and in which regulators set all unbundling charges) — is a world in which competitors would have little, if anything, to compete about.[30/]

As discussed above in section II, *supra*, the 1996 Act was intended to promote the deployment of facilities-based competition. Justice Breyer's concurring opinion eloquently states the public policy rationale for this decision. Accordingly, when interpreting the specific language of section 251(d)(2), the Commission should be guided by Congress' desire to motivate new telecommunications entrants to build their own facilities and reduce reliance on the

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27/ *Id.* at 753.

28/ *Id.* at 754 (citation omitted).

29/ *Id.*

30/ *Id.*

incumbents' infrastructure. Rather than automatically assuming that ILEC network elements should be unbundled and made available, the Commission should apply a more rigorous test, described below, which carefully examines whether access to those elements is essential to the new entrant's success.

B. "Necessary" and "Impair" Establish Separate Standards for Different Classes of Elements.

In the *Notice*, the Commission observes that both the Eighth Circuit and Supreme Court have construed the 1996 Act as differentiating the standard for "proprietary" as opposed to "nonproprietary" network elements, and seeks "comment on whether our understanding of the court's interpretation should govern in this proceeding."[31/] This request appears to raise the issue of whether the Commission should interpret section 251(d)(2) as establishing two separate standards for two separate types of network elements. In addition, the *Notice* "seeks more specific comment on what factors or criteria the Commission should adopt in determining whether access to networks elements is necessary and whether failure to provide such access would impair an entrant's ability to provide service."[32/] Finally, the *Notice* seeks "comment on whether and the extent to which an increase in cost or decrease in quality caused by the inability of obtaining access to an incumbent's network element meets the "necessary" or "impairment"

31/ *Notice* at ¶ 19.

32/ *Id.* at ¶ 20.

standard . . . [C]ommenters should distinguish between the "necessary" and "impair" standards *if* appropriate to do so in light of the factor being discussed."[33/]

Cox urges the Commission to treat the two statutory terms as establishing separate and unequal standards, each applicable to a different type of network element. Section 251(d)(2)(A) directs that unbundling of an element that is proprietary in nature be required only where such access is necessary. In contrast, section 251(d)(2)(B) permits access to nonproprietary elements if denial of access "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Under these provisions, a network element should first be classified in terms of its proprietary or nonproprietary nature, and then the appropriate standard should be applied. In determining whether the appropriate standard is met in each case, the Commission should evaluate criteria such as resulting decreases in quality and increases in cost if the access to the element on an unbundled basis is denied. But the *level* of the decrease in quality and increase in cost should be significantly greater to demonstrate that unbundled access to the proprietary network element is "necessary," than it would be to demonstrate that denial of access to a nonproprietary network element would "impair" the carrier's ability to provide service.

"Necessary" and "impair" are not synonymous in common usage, and should be accorded different interpretations in the context of this statute. It is a basic principle of statutory construction that when Congress uses two distinct limiting terms, the terms should be given two

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33/ *Id.* at ¶ 21 (emphasis added).

different meanings.[34/] The context of the section 251(d)(2) also makes clear that "necessary" is a higher standard because it is applied only to a select subset of all network elements — those that are "proprietary in nature." If the standards were identical, or if "impair" were a higher standard, there would be no need for the "necessary" limitation. Finally, in ordinary usage, "necessary" sets a higher standard than "impair." The Merriam Webster Collegiate Dictionary defines "necessary" as "essential," "indispensable," "absolutely required," while "impair" is defined as "to damage or make worse by, or as if by, diminishing in some material respect" or "handicap."[35/]

For these reasons, the Commission must apply a different test to the "necessary" and "impair" statutory standards. Thus, once a demonstration is made that access to the proprietary element meets the higher "necessary" standard, there is no need to make the additional, and lesser included, determination that a failure to provide such access would impair an entrant's ability to provide service. Conversely, merely showing that denial of access to a proprietary network element would "impair" the ability to provide service would not satisfy the statutory standard under section 251(d)(2)(A) that unbundled access to the proprietary element be "necessary."

34/ *Wilson v. Turnage*, 750 F.2d 1086, 1091 (D.C. Cir. 1984) ("Where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings").

35/ Merriam Webster Collegiate Dictionary, Tenth Edition (1993).

C. "Necessary" Must be a Higher Standard Than "Impair."

The *Notice* acknowledges that in the initial phase of this proceeding, the parties identified few "proprietary" concerns pertaining to the network elements unbundled under section 51.319, and that where they did, the Commission found that access to such network elements was "necessary."[36/] The *Notice* seeks comment generally on the meaning of the term "proprietary" for purposes of section 251(d)(2), and particularly on whether the term "proprietary" should be limited to information, software, or technology that can be protected by patents, copyrights, or trade secrecy laws, or whether it can also apply to materials that do not qualify for such legal protection.[37/]

Given the importance to commercial enterprises of maintaining control over, and deriving the beneficial gains from, their proprietary creations, the Commission should adopt a restrictive view of when unbundled access to a proprietary network element is "necessary." The "essential facilities" doctrine, which the Supreme Court noted was analogous to the unbundled network element provision, provides some useful guidance that the Commission should follow when considering whether a proprietary network element is "necessary" for purposes of section 251(d)(2).[38/]

36/ *Notice* at ¶ 15 n. 22.

37/ *Notice* at ¶ 15. Cox's suggestions regarding the meaning of "proprietary" are discussed below *infra* Part IV.

38/ As discussed below, it can also provide guidance on the "impair" standard, as the so-called "essential facilities" cases run the gamut from requiring the plaintiff to demonstrate that the facility is "indispensable" to demonstrating that its denial would inflict a "severe handicap"

(continued...)

Essential facilities cases are properly considered a subset of Sherman Act section 2 "refusal to deal" case law. They impose obligations similar, but not identical, to common law duties to deal traditionally imposed on monopolies "clothed with a public interest," such as "public utilities."[39/] Under the essential facilities doctrine, a monopolist's refusal to deal may be deemed unlawful where the monopolist controls something that is identified as an "essential facility," *i.e.,* a critical input for which there is no market alternative. The courts have held that under such circumstances, the monopolist must make that facility available to competing firms on nondiscriminatory terms.[40/]

One of the oft-cited cases under the doctrine, *Otter Tail Power Company*, involved an investor-owned utility, Otter Tail Power, that exclusively supplied both "wholesale" and "retail" electrical services.[41/] When several municipalities decided to form their own public electric power utilities and supply the retail component of electric service themselves, Otter Tail refused to provide wholesale service to them. Because the municipalities could not duplicate the facilities needed to supply the wholesale transmission of electricity, Otter Tail's denial of that facility *eliminated the possibility of competition in the retail market.* The Supreme Court, noting

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38/ (...continued)
on potential market entrants.

39/ *See generally* 3A P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 770-774 (Refusals to Deal and "Essential Facility" Doctrine) (1996) and ¶¶ 785-787 (Exclusionary Practices by the Regulated Monopolist); Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841 (1989).

40/ *See United States v. Terminal Railroad Association*, 224 U.S. 383 (1912).

41/ *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973).

that Otter Tail possessed a "strategic dominance in the transmission of power," determined that it had used its monopoly power over an essential facility to foreclose retail competition completely in violation of section 2 of the Sherman Act.[42/]

In 1983, the Seventh Circuit expressly applied *Otter Tail* in holding that AT&T's predivestiture control over the local loop represented control over an essential facility:

> AT&T had complete control over the local distribution facilities that MCI required. The interconnections were essential for MCI to offer [foreign exchange] and [common control switching arrangement] service. The facilities in question met the criteria of "essential facilities" in that MCI could not duplicate Bell's local facilities. Given present technology, local telephone service is generally regarded as a natural monopoly and is regulated as such. It would not be economically feasible for MCI to duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses), and regulatory authorization could not be obtained for such an uneconomical duplication.[43/]

These cases, one involving exclusionary practices by a regulated public utility and the other exclusionary practices by a telephone common carrier, indicate that a facility must be found to be absolutely necessary for competition before it can be considered an "essential facility" for purposes of providing competitors with nondiscriminatory access.[44/] The Commission should

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42/ *Id.* at 377.

43/ *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir. 1983). In contrast to the circumstances confronting the court in 1983, the local exchange is no longer considered and regulated as a natural monopoly. Indeed, as noted in II, *supra,* the intent behind the 1996 Act was to "dismantle the legal, operational and economic barriers that frustrated competitive entry in the past." Nonetheless, the antitrust principles articulated in this case may provide useful guidance to the Commission in articulating the "necessary" standard for UNE purposes.

44/ *See also Alaska Airlines, Inc., v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) ("A facility that is controlled by a single firm will be considered 'essential' only if control

(continued...)

apply a similarly stringent standard when determining whether access to a proprietary network element is "necessary" under section 251(d)(2)(A). Access to such network elements should be granted only if the network element is absolutely necessary or "indispensable" for competition local exchange competition. In such instances, denial of access would not only "impair" the ability to compete, it would completely preclude it.

This stringent standard is appropriate when access is sought to network elements that are "proprietary in nature," to achieve the appropriate balance between encouraging competitive entry into local telecommunications markets, while still preserving the incumbent's incentives to continue to develop and maintain its facilities. Proprietary elements are those that are proprietary to the ILEC, such as a feature or functionality invented or developed by the ILEC and unavailable on the market from its vendors. Such valuable and innovative proprietary facilities or functionalities will not be developed by ILECs as readily or as well if the ILEC is forced to share them with competitors. In the end, consumers will benefit more if competitors are each developing proprietary functions and features that distinguish their services from one another in terms of diversity, quality and price, than they would if all competitors merely piggyback on the functions and features developed by the ILEC.

44/ (...continued)
of the facility carries with it the power to *eliminate* competition in the downstream market;" because control of a computerized reservation system did not give the power to eliminate competition in the downstream air transportation market, the reservation system was not an essential facility) (emphasis in original).

In determining whether a network element is "necessary" in a particular case, the Commission also must take into account the availability of the specific network element, or its practical alternatives, from outside sources and the feasibility of the new entrant's ability to compete effectively without the facility. If there are practical and feasible alternatives, the proprietary network element should not be considered "indispensable" for local exchange competition, and it should not be made available on an unbundled basis. Application of this approach will help achieve the competitive goals of the 1996 Act without unduly chilling the investment and innovation incentives of the ILECs.

D. "Impair" Must Encompass a Material Detriment.

Section 251(d)(2)(B) establishes the less exacting "impair" standard for access to nonproprietary network elements than the "necessary" standard applicable to proprietary elements. Congress presumably used a more relaxed test for these elements because mandated access to proprietary elements that are the unique property of the ILECs is not involved. Nonetheless, given its goal of fostering facilities-based competition in particular, and its reluctance to mandate access to other people's property in general, Congress did not intend that nonproprietary UNEs at any level of granularity be made readily available to all comers. The "impairment" standard must therefore be interpreted as involving a material detriment that is more than just slightly burdensome to the new entrant's ability to provide service. For example, a burden that merely increases costs to the level of market rates or increases operating difficulties slightly might not rise to the level of an impairment under this definition. However, the lack of availability of a UNE that causes a competitor to lose or fail to gain customers would qualify.

Two lines of cases are instructive when analyzing the "impairment" standard. The first involves determinations of when a state law that impairs a private contract should be found to violate the Contract Clause of the U.S. Constitution.[45/] The second involves those "essential facilities" decisions that apply a somewhat less rigorous test for mandated access than the "essential facilities" cases discussed in the previous section. Cox believes that the Commission should draw on both of these analogous areas of the law to develop its articulation of the "impairment" standard of section 251(d)(2)(B). As discussed below, both areas support a determination that access to nonproprietary UNEs should be required only where failure to provide such access would constitute a "severe impediment" to the requesting carrier's provision of services.

The first relevant line of cases involves application of the Contract Clause of the Constitution to state laws affecting contract obligations. When analyzing the constitutionality of state laws which alter the obligations of private contracts, the Supreme Court's threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." If the state regulation constitutes a substantial impairment, the state must demonstrate that the law has a significant and legitimate public purpose, such as the remedying of a broad and general social or economic problem. The state also must demonstrate that the means chosen to accomplish this purpose are reasonable and appropriate.[46/]

45/ U.S. Constitution, art. I, § 10.

46/ *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977).

The extent of the impairment is a relevant factor in determining whether the impairment can be held reasonable or should be held unconstitutional.[47/] State measures that are merely burdensome are not be forbidden under the Contract Clause.[48/] On the other hand, the Contract Clause does not require the total destruction of expectations under the contract.[49/] Rather, the contracting party must experience a severe hardship for the state measure to rise to the level of a constitutionally prohibited "impairment" of contract.

The other relevant line of authority for establishing an "impair" standard lies again in the "essential facilities" doctrine cases that concentrate on the level of harm caused by the monopolist's denial of access to a particular facility. In *Hecht v. Pro-Football, Inc.*, for example, the D.C. Circuit defined essential facilities as facilities owned by a monopolist that "cannot practicably be duplicated by would-be competitors."[50/] The court went on to explain that "[t]o be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."[51/]

In its remand order in this proceeding, the Supreme Court recommended that the Commission refrain from considering just any increase in cost, decrease in quality or mere

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47/ *United States Trust Co.*, 431 U.S. at 27.

48/ *City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965).

49/ *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 409 (1983).

50/ *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977).

51/ *Id.*

inconvenience due to the loss of anticipated annual profits as causing an impairment sufficient to justify the mandatory provision of the network element concerned.[52/] The "severe handicap" tests developed in these other areas of the law are consistent with the Supreme Court's direction that the Commission consider the availability of the network element from sources outside the ILEC, including self-provisioning, and the level of the cost increase caused by having to provision the element from a source other than the ILEC.

In practice, the Commission's assessment of the impact on a competitor of an ILEC's failure to provide a certain network element could include comparative measures of the reliability of the ILEC versus the reliability or accuracy of third party providers; the meaningful differences in costs from alternate sources; the difference in the length of time it takes to obtain a network element from an ILEC rather than from a third-party supplier; as well as meaningful differences in a customer's perception of the CLEC services when the element in question is obtained from an ILEC as opposed to another source.

Again, the gain or loss of customers will provide an appropriate real world benchmark for determining whether this test is met. For example, if a non-ILEC vendor does not provide the same functionality or uses databases that are not promptly updated, does not provide adequate repair and maintenance services, or takes substantially more time to provide the requested element, those differences could be used to demonstrate that the ILEC's failure to provide a network element "severely handicaps" the CLEC, particularly in light of customer behavior, and thus should be considered an "impairment" to the CLEC's provision of services sufficient to

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52/ *AT&T v. Iowa Util. Bd.*, 119 S.Ct. at 735.

trigger the safeguard provision of section 251(d)(2)(B). By contrast, mere disadvantage to the requesting party's ability to compete or a mere inconveniencing of a requesting party (such as the need for obtaining the element elsewhere, a minor delay and/or payment of a non-prohibitive extra cost) does not rise to the level of impairment under section 251(d)(2)(B).

IV. THE COMMISSION SHOULD REQUIRE THE AVAILABILITY OF CERTAIN UNES THAT ARE CRITICAL TO THE DEVELOPMENT OF FACILITIES-BASED COMPETITION.

The next step in the Commission's analysis is to apply the appropriate tests to specific network elements to determine whether these elements should be made available. Some elements must be made available because even facilities-based CLECs continue to depend on the use of certain features and functionalities from ILECs if they are to compete in the local exchange marketplace. CLECs need these critical network elements for various reasons, including that they have not yet developed ubiquitous networks and systems. ILEC resistance to making these essential unbundled functionalities available has inhibited the development of CLEC networks.[53/]

As an experienced facilities-based provider serving both residential and business customers, Cox has identified four network elements that should be unbundled pursuant to

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53/ For example, ILECs notoriously have ignored their obligation to provide electronic access to operational support systems ("OSS"). *See, e.g.,* Application of BellSouth Corp., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in South Carolina, *Memorandum Opinion and Order*, 13 FCC Rcd 539 (1997); Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as amended, to Provide In-region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, 12 FCC Rcd 20543 (1997).

section 251(d)(2)(B)): (1) operational support systems ("OSS"); (2) operator services; (3) directory assistance; and (4) signaling systems and associated databases.[54/] Each of these features and services plainly falls within the scope of the definition of "network elements" in the *Local Competition Order*, which was affirmed by the Supreme Court earlier this year.[55/] As shown below, each of these elements also is critical to CLEC operations. Moreover, none of these elements is proprietary, so they are subject only to the "impair" test. Therefore, the Commission should require the availability of these network elements on an unbundled basis under section 251(d)(2)(B).

A. CLECs Require Access to OSS.

As the Commission recognized in the *Local Competition Order*:

> the massive [OSS] employed by [ILECs] and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential barrier to entry . . . . Much of the information maintained by these systems is critical to the ability of other carriers to compete with [ILECs]. . . . Without access to review, *inter alia*, available telephone numbers, service interval information and maintenance histories, competing carriers would operate at a significant disadvantage with respect to the incumbent. . . . [I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing . . . in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing.[56/]

54/ Cox does not suggest that these elements necessarily are the only ones to be unbundled, but only that these elements meet the criteria for unbundling.

55/ 47 U.S.C. § 153 (29); *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. at 734.

56/ *Local Competition Order,* 11 FCC Rcd at 15763-4.

Consequently, the Commission found that the availability of OSS functions is a condition to the successful entry of competitive carriers on the local exchange service market.[57/] Nothing that has happened in the past three years has eliminated the need for CLECs to have electronic access to ILEC OSS. So long as CLECs are interconnected to ILECs, with or without recourse to UNEs, they will need electronic access to OSS for the very purposes the Commission identified in the *Local Competition Order*.

For instance, absent access to information about service intervals (which is available to the ILECs as a matter of course) it would be impossible for CLECs to provide accurate information about when they will be able to serve prospective customers. The inability to reliably predict when service will begin would greatly reduce customer confidence in the CLEC, severely handicapping CLECs in the marketplace. The same concerns arise in connection with many other OSS functions (typically accessed electronically), such as maintenance histories and ordering interfaces. If these functionalities are unavailable to CLECs, the effect on their ability to compete will be devastating.

Moreover, there is no substitute for electronic access to the ILEC's OSS. Much OSS functionality simply cannot be found anywhere else because it relates directly to information that is only in the ILEC's control. This is particularly the case for service-related information, but also is true of maintenance histories and other OSS functionalities. Thus, there can be no question that access to ILEC OSS is critical to CLEC operations and that OSS should be unbundled.

57/ *Id.* at 15766.

B. CLECs Require Access to Operator Services and Directory Assistance Services.

Operator services and directory assistance raise different issues than OSS. While it is evident there is no other source for OSS than the ILEC, there are some potential alternative sources for operator services and directory assistance. The alternatives, however, are substantially inferior to the existing ILEC functionalities at this time, and the use of alternative providers even could raise public safety issues in some cases. Consequently, operator services and directory assistance must be made available as UNEs.

There are several reasons why a lack of access of operator services and directory assistance would severely impair the provision of CLEC services. First, ILECs have significant economies of scale and scope in the provision of these services, which the *Notice* properly recognized may be a factor in determining new entrants' need for network elements.[58/] These economies of scale and scope, which greatly reduce the cost of providing these services, are almost entirely a legacy of the mandated monopolies held by ILECs during the last century.

Second, ILECs have unparalleled access to the resources, including customer information, needed to provide these elements. There are no effective substitutes for these resources available to CLECs at this time. While all LECs have an obligation to make directory information available under section 222, in practice only ILECs have real time access to this data.[59/]

58/ *Notice* at ¶ 27.

59/ 47 U.S.C. § 222(e).

Third, customers are likely to perceive important quality differences if CLECs use "national" service operators instead of ILECs' operator services. In particular, the databases used by "national" operator services and directory assistance providers are not updated nearly as frequently as ILEC databases. Another significant concern is that national operator service providers have, at best, limited abilities to connect with local public safety answering points in an emergency. Indeed, alternative providers often instruct callers seeking emergency assistance by dialing "0" to instead dial "911", rather than connecting them directly. These differences in quality are very significant to consumers and to basic public safety considerations. In fact, many consumers would view limitations on access to emergency services as a disqualifying handicap for a CLEC.

In this context, it is evident that, as the *Notice* suggests, significant differences in quality that result from acquiring a network element from an ILEC rather than other sources are highly relevant to the analysis of whether an element should be unbundled.[60/] Here, there are substantial differences not only in the quality and the quantity of the information provided but also in the nature of the service that the new entrant can obtain from an ILEC or an alternative source. These differences affect customer behavior and therefore absolutely affect competition.

Finally, the Commission should recognize that these elements are central to the provision of local exchange service. As the Federal-State Joint Board on Universal Service noted when considering what services should be eligible for universal service support, "operator services are . . . used by at least a substantial majority of residential customers, even though customers are

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60/ *Notice* at ¶ 28; *see also supra* Part III.

often charged for using those services"[61] and "[a]ccess to E911 is essential to public health and safety because it facilitates the determination of the approximate geographic location of the calling party."[62] Similarly, customers expect prompt, accurate directory service. Thus, if CLECs are unable to provide these services at parity with ILECs, they will be subject to a substantial handicap in the marketplace and will be unable to compete effectively.

C. CLECs Require Access to ILEC Signaling Systems and Databases.

As the Commission noted in its *Local Competition Order*, the 1996 Act requires BOCs to provide "nondiscriminatory access to databases and associated signaling necessary for call routing and completion" before they can obtain authority to provide in-region interLATA services.[63] Because of this requirement, the Commission concluded that the 1996 Act contemplated the unbundling of signaling systems as network elements.[64] The Commission should reaffirm that conclusion, for the reasons described both in the *Local Competition Order* and below.

As a threshold matter, the Commission should reaffirm that signaling systems and associated databases are not "proprietary" elements and, therefore, are not subject to the

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61/ Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking and Order Establishing Joint Board*, 11 FCC Rcd 18092, 18106 (1996).

62/ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 8815 (1996).

63/ *Local Competition Order*, 11 FCC Rcd at 15738. *See also* 47 U.S.C. § 271(c)(2)(B)(x).

64/ *Local Competition Order*, 11 FCC Rcd at 15738.

"necessary" test. Proprietary elements are those that are proprietary to the ILEC, such as a feature of functionality invented by the ILEC and unavailable from, for instance, the ILEC's switch vendor. As the Commission acknowledged in the *Local Competition Order*, ILEC signaling is not proprietary but rather adheres to a widely used Signaling System 7 ("SS7") protocol adopted by Bellcore and other standards bodies.[65/] Signaling databases, similarly, are constructed according to established standards and the information they contain is customer-related, not proprietary to the ILEC.[66/]

In practice, however, ILEC signaling and associated databases are critical to the effective operation of the network of interconnected networks at this time and so must be made available under either prong of section 251(d). While there are some vendors of signaling services, they are not a full substitute for ILEC signaling or databases.[67/] For instance, use of third party vendors can result in delays and errors that would not result if a CLEC is connected directly with the ILEC signaling system. In addition, access to ILEC databases is the only practical way, in some cases, to ensure proper call flow when, for example, an ILEC customer is using call forwarding features.

65/ *Id.* at 15723-4, 15739.

66/ *See generally* 47 U.S.C. § 222 (granting customers power over customer specific information).

67/ In the *Local Competition Order*, the Commission already recognized that alternative signaling methods, such as in-band signaling, would provide lower quality service and would significantly impair the competitor's ability to provide service. *Local Competition Order,* 11 FCC Rcd at 15740.

Similarly, ILECs are the only providers of Calling Name ("CNAM") database information. Customers with Caller ID expect to receive both the telephone number and the name of the calling party on their machine screen. They would perceive CLEC Caller ID to be deficient if CLECs cannot offer the full information to their subscribers. Indeed, ILEC CNAM databases give access to information about both the ILEC subscribers and subscribers of other local exchange carriers that choose to store this information in the CNAM database.[68/] In Cox's experience, third party vendors do not have access to this information, with the result that customers simply do not receive the caller name information they expect. Therefore, CLECs that do not have access to the calling name information owned by ILEC are at a serious competitive disadvantage.

Finally, because signaling is critical to proper call flow on both ILEC and CLEC networks, there can be little question that the most efficient and effective signaling capabilities must be available to ILECs and CLECs alike. It is not just a matter of enabling competition (although CLECs that lack access to signaling will be severely handicapped), but a question of ensuring the reliability of the public switched telephone network as a whole. Thus, until CLECs can reliably have their signaling needs met elsewhere, signaling and associated databases must be made available as UNEs.

68/ One standard condition of ILEC interconnection agreements is that the CLEC provide its directory information to the ILEC in a timely fashion. As a result, ILECs have ensured that they (and only they) have the most complete, timely and accurate directory databases.

V. THE COMMISSION SHOULD PERIODICALLY REVIEW THE UNES REQUIRED BY ITS RULES TO DETERMINE WHETHER ILECS SHOULD BE REQUIRED TO OFFER THEM.

The 1996 Act embodies a Congressional preference for limiting regulation whenever possible. This preference is reflected in the purposes of the Act, which expressly include to "provide for a pro-competitive, *de-regulatory* national policy framework," and is further crystallized in sections 10 and 11 of the Act, which permit forbearance and require periodic regulatory reviews, respectively.[69/] The Commission should apply the same principle to its determinations as to which UNEs should be made available and adopt a schedule for periodic review of UNE requirements.

There are several reasons why the Commission should undertake such a periodic review. First, such a review is consistent with the Congressional intent to limit regulation whenever possible.

Second, local exchange carriers' networks are likely to change as technology evolves and competition develops in the local telecommunications market. It is thus appropriate for the Commission periodically to review what ILEC network elements CLECs require under the dual standards of necessity and impairment.

As time passes, it is likely that CLECs will need, and will request, fewer UNEs from ILECs to compete effectively. In particular, UNEs will become less important as CLECs develop their own facilities and services and become more self-sufficient. Moreover, third-party

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69/ Joint Explanatory Statement at 1; 47 U.S.C. §§ 160, 161 (Commission to repeal regulations that are no longer in the public interest "as a result of meaningful competition between providers of such service").

vendors will continue to increase the variety, quality and efficiency of the services and equipment they offer. The gap between the network elements available from these parties and those that CLECs can now only obtain from ILECs will steadily narrow. As this occurs, maintaining some network elements on the UNE list will further reduce the incentive for CLECs and list third-party vendors to develop their own facilities. Indeed, as Robert Crandall of the Brookings Institution has explained "if 'deregulation' and liberalization are to accomplish their principal purpose, they must encourage the construction of new facilities — by entrants and incumbents alike — that are designed to serve today's market with today's and tomorrow's technology."[70/] Thus, periodic review of the list of network elements to be unbundled will facilitate the Congressional intent to promote facilities-based competition.

Moreover, there is no legal barrier to a periodic review. While section 10(d) of the Communications Act restricts the Commission's power to forbear from the section 251(c) requirement to provide access to unbundled elements, it does not place any restrictions on the Commission ability to specify which elements are to be made available. In fact, the Supreme Court held that the specific elements to be made available as UNEs are not specified under section 251(c).[71/] Section 251(d)(2), which is the only provision that describes the Commission's power to unbundle ILEC network elements, is not subject to the limitation of section 10(d).

70/ Robert W. Crandall, "Managed Competition in U.S. Telecommunications", AEI-Brookings Joint Center for Regulatory Studies, Working Paper 99-1, Mar., 1999, at 17. Mr. Crandall also notes that "[r]equiring that incumbents grant access to their 'bottleneck' facilities might make sense for at least some period of time, but there is no need to require access to those facilities that could (and should) be replicated in some form by entrants." *Id.*

71/ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. at 736.

Even if section 10(d) were to apply to section 251(d)(2), it would not be a bar to the modification of the Commission's UNE list. It would bar only a decision not to apply the tests laid out in section 251(d)(2).

The Commission has the power to review the continuing appropriateness of its own rules and to adopt rules implementing the Communications Act.[72/] Moreover, the Commission can revisit any rule when circumstances change or new factors emerge. The Commission's power to revise its rules was reinforced by Congress in section 11 of the 1996 Act, which requires a biennial review of the Commission's rules and requires repeal of rules that no longer are in the public interest.[73/] In other words, the Commission has both the power and the obligation to review the list of UNEs and to eliminate elements from that list when they no longer meet the criteria for mandatory unbundling.

VI. CONCLUSION.

The Commission now has the opportunity to modify its UNE rules to inject economic rationality into the market entry equation. The Commission should not sacrifice the serious prospect of facilities-based competition on the altar of short-run market entry by perpetuating heavily discounted UNE platforms that fail to meet the Act's twin tests of necessity and

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72/ *Id.* at 724, 730; *see also* Beehive Telephone, Inc. v. The Bell Operating Companies, *Memorandum Opinion and Order*, 12 FCC Rcd 17930, 17937 (Commission "has general authority to suspend, waive or amend its rules . . . for good cause").

73/ 47 U.S.C. § 161.

impairment. The Congressional preference for sustainable, facilities-based competition should be reflected in the Commission's revised rules.

In the area of mandatory access to ILEC unbundled network elements, the Commission has to revise its interpretation of the statutory terms to take into account the plain language of section 251(d)(2). The Commission also must determine whether the lack of access to a particular ILEC network element would be competitively significant. The Supreme Court correctly indicated that there are legal bounds governing an ILEC's obligation to unbundle the elements of its network. Thus, a closer reading of section 251(d)(2)'s provisions and periodic Commission review of the network elements made available under that section are required.

A more appropriate balance of ILEC obligations and competing carriers' needs can be struck if access to ILEC proprietary network elements is granted only when the failure to do so would eliminate competition in the market for the particular telecommunications service the CLEC intends to provide. Access to non-proprietary network elements should be granted if competing carriers otherwise would be at a severe competitive disadvantage. Any decision to apply the unbundling requirement should result from a careful examination of the characteristics of each individual network element and the comparability of its substitutes.

Applying this standard, there is no reasonable equivalent substitute to ILEC OSS functions, operator services, directory assistance, signaling systems and ILEC associated databases. Denial of access to those network elements would significantly impair facilities-based CLEC market entry. Therefore, as a facilities-based provider, Cox urges the Commission

to apply the unbundling requirement to these network elements until it is shown that failure for ILEC to give access to these elements no longer substantially impairs or prevents a competitors' entry.

Respectfully Submitted,

COX COMMUNICATIONS, INC.

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May 26, 1999

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, do hereby certify that on this 26th day of May, 1999, I caused a copy of the foregoing Comments of Cox Communications, Inc. to be served upon each of the parties listed below:

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